STANDING UP AGAINST MORE ETHANOL: THE D.C. CIRCUIT'S RESTRICTIVE VIEW IN *GROCERY MANUFACTURERS ASS'N V. EPA*, 693 F.3D 169 (D.C. CIR. 2012)*

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I. INTRODUCTION

Renewable fuel is a popular "going green" concept. Such fuel is considered an important component toward the goals of reduced dependence on foreign oil and an improved environment.[1] Ethanol, manufactured primarily from corn, is a common renewable fuel option and contributes significantly to renewable fuel consumption.[2] In 2011 alone, the United States consumed 12.89 billion gallons of ethanol.[3] Additional renewable fuel standards are expected to increase ethanol use by seven billion gallons annually.[4] Until recently, ethanol blended with petroleum gasoline was done primarily at a ratio of ten percent (E10).[5] In 2010, however, the U.S. Environmental Protection Agency (EPA) approved an ethanol blend of fifteen percent (E15).[6]

As is the case with advancing many social and economic policies, all parties may not be positively affected by increased ethanol use. For

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* Best Legal Casenote (2013), Southern Illinois University Law Journal.

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1. Harry de Gorter & David R. Just, *The Social Costs and Benefits of Biofuels: The Intersection of Environmental, Energy and Agricultural Policy*, 32 APPLIED ECON. PERSPS. & POL'Y 4, 4-5 (2010).
2. *Ethanol*, U. ILL. EXTENSION, http://web.extension.illinois.edu/ethanol/ (last visited Nov. 28, 2013).
3. U.S. ENERGY INFO. ADMIN., MONTHLY ENERGY REVIEW 143 (Sept. 2012), *available at* http://www.eia.gov/totalenergy/data/monthly/previous.cfm.
4. Larry Bell, *Ten Reasons to Care that E15 Ethanol is on the Way to Your Gas Station*, FORBES (Sept. 23, 2012, 9:02 AM), http://www.forbes.com/sites/larrybell/2012/09/23/ten-reasons-to-care-that-e15-ethanol-is-on-the-way-to-your-gas-station/.
5. Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 172 (2012).
6. Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator, 75 Fed. Reg. 68,094 (Nov. 4, 2010); Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy To Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator, 76 Fed. Reg. 4662-01 (Jan. 26, 2011). These partial grants limited E15 use to model-year 2001 and newer light-duty engines.

example, current ethanol use consumes an estimated forty percent of domestic corn production, and consequently, corn price volatility has more than doubled since 2007.[7] In addition, increasing ethanol use places strains on fuel distribution infrastructure, exacerbated because of ethanol's corrosive properties.[8] In *Grocery Manufacturers Ass'n v. EPA*, several industry groups challenged the EPA's E15 approval, alleging injuries from higher costs and increased liability.[9] The petitions were all dismissed due to lack of standing.[10]

This Note will examine *Grocery Manufacturers* in regards to the standing decisions of the U.S. Court of Appeals for the District of Columbia Circuit. This Note will argue that the court was incorrect in its analysis and subsequent denial of standing for two of the petitioners. Section II will provide a background on standing requirements that the court found dispositive, from both Article III of the U.S. Constitution and judicially created constraints of prudential standing. Section III will discuss the facts and findings of the D.C. Circuit. Finally, Section IV will discuss why the court inappropriately restricted Article III by liberalizing the self-inflicted injury test and placed too great of a restriction on the prudential zone of interest requirement.

II. LEGAL BACKGROUND

Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right."[11] This right to bring a lawsuit has a storied and varied history, frequently identified as "one of the most confusing areas of law."[12] The U.S. Supreme Court has described standing as a "doctrine [that] incorporates concepts concededly not susceptible of precise definition."[13] Nevertheless, there are some fundamental doctrinal requirements for standing that have been articulated by the Court. First, a "core component" of standing is derived directly from Article III of the Constitution and limits federal courts to adjudicating only actual "cases" and "controversies."[14] Second, in addition to Article III, the Court has further limited its jurisdiction by creating self-imposed prudential

7. Bell, *supra* note 4.
8. BRENT D. YACOBUCCI & RANDY SCHNEPF, CRS REPORT FOR CONGRESS: ETHANOL AND BIOFUELS: AGRICULTURE, INFRASTRUCTURE, AND MARKET CONSTRAINTS RELATED TO EXPANDED PRODUCTION (2007), *available at* http://fpc.state.gov/documents/organization/82500.pdf .
9. 693 F.3d at 172-79.
10. *Id.* at 171.
11. BLACK'S LAW DICTIONARY 1142 (8th ed. 2004).
12. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND PROCEDURES 59 (4th ed. 2011).
13. Allen v. Wright, 468 U.S. 737, 751 (1984).
14. U.S. CONST. art. III, § 2, cl. 1; *Allen*, 468 U.S. at 750-51.

constraints.[15] Both Article III and prudential standing must be satisfied for a federal court to have jurisdiction, and both doctrines were integral to the court's decision in *Grocery Manufacturers*.

A. Article III Case and Controversy

A party must meet three elements to satisfy the Article III "case or controversy" requirement.[16] A litigant must (1) have suffered or "imminently will suffer" an injury in fact; (2) show that the injury was caused by the defendant's conduct; and (3) show the injury is one that can be redressed by a favorable court decision.[17] The injury in fact, causation, and redressability elements are not well defined, and courts have found them difficult to apply with reliable consistency.[18] In *Grocery Manufacturers*, the causation element was the central Article III factor and this Note will address that element.[19]

Causation requires the alleged injury be "fairly traceable" and not "too attenuated" to the defendant's conduct.[20] Self-inflicted injury has been one consideration that may defeat causation as not fairly traceable or too attenuated.[21] For example, in *Diamond v. Charles*, the Supreme Court held that liability for attorney fees based on the petitioner's own decision to intervene in the case was a self-inflicted injury and, therefore, was not fairly traceable to the statute at issue.[22] Likewise, in *Pennsylvania v. New Jersey*, the Court found a state giving tax credits to a taxpayer for taxes paid to another state was a self-inflicted injury which defeated standing because "[n]o State can be heard to complain about damage inflicted by its own hand."[23] Based on *Diamond* and *Pennsylvania*, the D.C. Circuit has extended the "self-inflicted" injury limitation to more liberalized applications.

15. *Allen*, 468 U.S. at 751.
16. Ne. Fla. Contractors v. Jacksonville, 508 U.S. 656, 663-64 (1993).
17. *Id*.; *see also* CHEMERINSKY, *supra* note 12, at 62.
18. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).
19. Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 177 (D.C. Cir. 2012).
20. *Allen*, 468 U.S. at 751-52. The concepts of "fairly traceable" and not "too attenuated" are not well defined. There is considerable uncertainty due to inherent impreciseness, and standing questions lend themselves answerable essentially by comparison to prior standing cases.
21. *See, e.g.*, Diamond v. Charles, 476 U.S. 54 (1986); Pennsylvania v. New Jersey, 426 U.S. 660 (1976).
22. 476 U.S. at 69-71.
23. 426 U.S. at 664.

1. Petro-Chem Processing, Inc. v. EPA

The facts in *Petro-Chem Processing, Inc. v. EPA*[24] demonstrate a concrete basis for the self-inflicted injury doctrine. The Hazardous Waste Treatment Council (HWTC) alleged that relaxing a regulation for disposal of hazardous waste in salt domes required HWTC members to suffer an economic disadvantage or be exposed to increased risk of litigation.[25] HWTC argued that, because of the less expensive choice of disposing hazardous waste in salt domes, their members would either be "forced" to use that choice over other alternatives or face losing business, and the use of salt domes created a greater risk for liability because of potential leakage.[26] The court held that these alleged injuries could not "fairly . . . be traced to the challenged action" as the decision to use salt domes was "incurred voluntarily."[27] Self-inflicted injury breaks the causal connection between the injury and the regulation, if done in self-interest.[28]

2. National Family Planning & Reproductive Health Ass'n v. Gonzales

Beyond *Petro-Chem*, the doctrine of self-inflicted injury has been applied in less concrete cases. In *National Family Planning & Reproductive Health Ass'n v. Gonzales*, the court denied standing based on the plaintiff organizations not pursuing available options to correct an alleged injury caused by conflicting law.[29] Plaintiffs were recipients of funding grants authorized under Title X of the Public Health Service Act and governed by a 2000 Health and Human Services (HHS) regulation requiring recipients to offer pregnancy termination information and counseling.[30] In 2004, however, Congress adopted the Weldon Amendment, which protected institutional and individual service providers that did not wish to provide services or references for abortions.[31] Plaintiffs alleged that the conflict between the Weldon Amendment and the HHS regulation put them at imminent risk of injury through loss of funding because no matter which course of action they chose they would be in violation of one of the two.[32] The D.C. Circuit vacated and remanded, ordering the lower court to dismiss the case for lack of jurisdiction because the injury "appear[ed] to be largely of [petitioner's] own making" and the

24. 866 F.2d 433 (D.C. Cir. 1989).
25. *Id.* at 438.
26. *Id.*
27. *Id.* (citation omitted).
28. *Id.*
29. 468 F.3d 826 (D.C. Cir. 2006).
30. *Id.* at 828.
31. *Id.* at 827.
32. *Id.* at 828.

petitioner had "within its grasp an easy means for alleviating the . . . uncertainty" by simply inquiring with the HHS about how that agency would propose to resolve the conflict.[33] The court held that the petitioner's choice to remain in a "lurch" without taking action to remedy was insufficient to show an injury caused by the amendment.[34]

3. Public Citizen, Inc. v. National Highway Traffic Safety Administration

As another example of a liberal application of the self-inflicted injury limit, in *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, the Secretary of Transportation, through the National Highway Transportation Safety Administration (NHTSA), adopted Federal Motor Vehicle Safety Standard 138.[35] Standard 138 required automakers to include an automatic tire pressure monitoring system on vehicles that would detect a minimum low tire pressure and alert the vehicle operator with an alarm light in the control panel.[36] Members of the tire industry alleged that the low-pressure minimum in Standard 138 was too low, which would increase the risk of tire failures leading to an increase in accidents and subsequent lawsuits.[37] The court found Standard 138 did nothing to prevent tire industry petitioners from attempting to prevent tires from becoming "significantly under-inflated in the first place."[38] Thus, the court held that the tire industry's alleged injury had "at least some of the hallmarks of a 'self-inflicted' injury."[39]

B. Prudential Standing

A plaintiff can breathe easily only for a moment if he or she survives the somewhat imprecise tests of Article III standing because the challenge is still not over. The plaintiff must still overcome applicable prudential constraints.

The Supreme Court has articulated prudential standing as a further requirement that "serve[s] to limit the role of the courts in resolving . . . disputes."[40] These limitations include a general bar against asserting a third-party right or a "generalized grievance" shared by a large number of

33. *Id.* at 831.
34. *Id.*
35. 489 F.3d 1279, 1283-84 (D.C. Cir. 2007).
36. *Id.*
37. *Id.* at 1290.
38. *Id.*
39. *Id.* (quoting Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales, 468 F.3d 826, 831 (D.C. Cir. 2006)).
40. Warth v. Seldin, 422 U.S. 490, 500 (1975).

individuals.[41] The Court provided judicial "gloss"[42] by adding an additional limitation that an interest "sought to be protected . . . [must be] arguably within the zone of interest . . . regulated by the statute . . . in question."[43] The zone of interest requirement is perhaps the most important requirement in environmental law cases.[44]

In administrative agency action, the Administrative Procedure Act (APA) provides standing if the plaintiff is "aggrieved by agency action within the meaning of a relevant statute."[45] The Court has interpreted "'the generous review provisions [of the APA]'" broadly and instructed the provisions not to be applied "grudgingly."[46] In other words, the zone of interest test is "not meant to be especially demanding" upon a plaintiff because of the presumption in favor of judicial review.[47] Generally, if a plaintiff is a party directly regulated by a statute or regulation, the zone of interest test is met.[48] A party not directly regulated by the challenged statute or regulation may still meet this test, but only if the party's interests are not "contrary to the purpose of the statute" or not "'so marginally related to or inconsistent with the purpose implicit in the statute that it can [not] reasonably be assumed . . . Congress intended to permit the suit.'"[49] This latter threshold requires that the challenged statute have a contextually integral relationship with another statute that does in fact protect the plaintiff's interest.[50]

1. National Petrochemical & Refiners Ass'n v. EPA

An example of the zone of interest principle was illustrated in *National Petrochemical & Refiners Ass'n v. EPA*.[51] Petitioner Mack Truck (Mack) challenged the EPA's modification to the engine emission "Averaging, Banking and Trading" program under the Clean Air Act (CAA).[52] Although not directly regulated by the provision challenged in the action, Mack was regulated under a different section of the CAA to pay nonconformance penalties.[53] Mack argued that the "structure of the CAA"

41. *Id.* at 499.
42. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 395-96 (1987).
43. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).
44. Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289, 298 (2011).
45. 5 U.S.C. § 702 (2012).
46. *Data Processing*, 397 U.S. at 156 (quoting Shaunessy v. Pedreiro, 349 U.S. 48, 51 (1955)).
47. *Clarke*, 479 U.S. at 399.
48. Warshaw & Wannier, *supra* note 44, at 298-99.
49. *Id.* at 299 (quoting Harvey v. Veneman, 396 F.3d 28, 34-35 (1st Cir. 2005)).
50. Fed'n for Am. Immigration Reform, Inc. v. Reno, 93 F.3d 897, 903 (D.C. Cir. 1996).
51. 287 F.3d 1130 (D.C. Cir. 2002).
52. *Id.* at 1146.
53. *Id.* at 1147.

showed Congress's intent for the EPA to "consider anticompetitive injury" because the mandated penalties under the nonconformance penalty provision were intended to "'remove any competitive disadvantages to manufacturers'" whose engines were in compliance.[54] The court agreed, finding Mack was within the zone of interests of the two provisions that "enjoy an integral relationship."[55]

2. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak

The integral relationship test was further illustrated in a recent decision by the Supreme Court, upholding a decision of the D.C. Circuit, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*.[56] The Secretary of the Interior acquired property for the Match-E-Be-Nash-She-Wish Band of Indians (Band) to be used for "gaming purposes," pursuant to the Indian Reorganization Act (IRA).[57] Patchak, an adjoining landowner, claimed injury because the planned land use as a casino would have "destroy[ed] the lifestyle he ha[d] enjoyed."[58] The Band posited Patchak was not "arguably within the zone of interest[]" of the IRA because the IRA regulated land acquisition, not land use.[59] The Court, however, considered the Band's view too limited and found instead, "When the Secretary obtains land for Indians under [the IRA], she does . . . so . . . with at least one eye toward how tribes will use those lands. . . ."[60]

3. Clarke v. Securities Industry Ass'n *and* Association of Data Processing Service Organizations v. Camp

Another approach to the zone of interest test has been to allow claims when the statute being challenged directly regulates a competitor. The Supreme Court has "established the general principle that competitor interests should be protected against injury, so long as [the competitive interests] lie within the zone of interests arguably protected by the underlying statutory . . . claim."[61] In *Clarke v. Securities Industry Ass'n*, the Court allowed securities dealers, pursuant to a provision of the National Bank Act (Bank Act), to challenge a decision of the Comptroller of the

54. *Id.* at 1147-48 (quoting 42 U.S.C. § 7525(g)(3)(E) (2012)).
55. *Id.* at 1148.
56. 132 S. Ct. 2199 (2012).
57. *Id.* at 2200-01.
58. *Id.* at 2203.
59. *Id.* at 2210.
60. *Id.* at 2211.
61. 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.8 (3d ed. 2008).

Currency.[62] The Court found Congress intended the Bank Act to control national banks from gaining monopolistic powers, and, therefore, the securities dealers had standing because they were an aggrieved party the Bank Act contemplated as competitors.[63] Similarly, in *Data Processing*, the Court held that the data processor petitioners were "arguably within the zone of interests" contemplated by the Bank Act, which limited banks from engaging in any activity other than traditional banking services.[64]

In two other cases the Court found competitors of financial institutions to have prudential standing.[65] A common thread among all four cases is that the statutes or scheme of statutes were intended to prevent injury from competitive behavior, and, therefore, the competitor plaintiffs had protected interests.

In summary, the requirements of standing are designed to ensure that the party bringing a lawsuit is the right party to ask the court to decide the merits of a case.[66] However, as the cases discussed *supra* illustrate, standing is not a concrete principle that is easily applied in all cases. As the Court has stated, there is considerable uncertainty due to inherent impreciseness in the standing analysis,[67] a difficulty that continued in *Grocery Manufacturers*.

III. EXPOSITION OF THE CASE

In *Grocery Manufacturers Ass'n v. EPA*, the D.C. Circuit considered whether three industry groups (Petitioners) representing car manufacturers (Engine Group), petroleum refiners/distributors (Petroleum Group), and cereal manufacturers/distributors (Food Group) had standing to bring an action under the CAA's section 211(f)(4) waiver provision.[68] The circuit court found that none of the Petitioners had standing because the Engine and Petroleum Groups failed to satisfy Article III and the Food Group failed the zone of interest test.[69]

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62. 479 U.S. 388 (1987).
63. *Id.* at 402-03.
64. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 156 (1970).
65. *See* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Inv. Co. Inst. v. Camp, 401 U.S. 617 (1971). *See generally* WRIGHT ET AL., *supra* note 61 (providing a review of competitor standing rulings).
66. CHEMERINSKY, *supra* note 12, at 59.
67. Allen v. Wright, 468 U.S. 737, 751 (1984).
68. 42 U.S.C. § 7545(f)(4) (2012); Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 173 (D.C. Cir. 2012). The Food Group includes such industry members as the American Meat Institute and the Snack Food Association. Alan Bjerga, *Grocery, Oil Groups Sue EPA Over Ethanol Decision*, BLOOMBERG (Nov. 9, 2010, 2:34 PM), http://www.bloomberg.com/news/2010-11-09/grocery-oil-groups-sue-epa-over-ethanol-decision-update1-.html.
69. *Grocery Mfrs.*, 693 F.3d at 175-79.

A. Facts

The Energy Independence and Security Act of 2007 (EISA) incorporated renewable fuels standards (RFS) into the CAA.[70] To conform to the RFS requirements, fuel refiners and importers have been producing and supplying E10 blended fuel, which includes ten percent ethanol blended with ninety percent petroleum gasoline.[71] However, E10 has "substantially saturated the U.S. gasoline market" and will not suffice alone to meet the increasing future RFS requirements, which require annual use to increase from around thirteen billion gallons currently to thirty-six billion gallons by 2022.[72]

New fuels, such as the fifteen percent ethanol E15 blend, cannot be introduced without prior approval.[73] Section 211(f)(4) of the CAA requires any new fuel that is not substantially similar to any existing fuel or additive to be granted a waiver by the Administrator of the EPA.[74] In March 2009, Growth Energy, a trade association representing the ethanol industry, applied to the EPA for a CAA section 211(f)(4) waiver to produce E15.[75] The EPA ultimately approved conditional "partial waivers" to introduce E15 for use in late model (2001 and later) light-duty vehicles.[76] Thus, the EPA approved E15 to help supply the rising demand for renewable fuels.

On appeal, Petitioners argued that: (1) the EPA lacked authority under CAA section 211(f)(4) to grant partial waivers in support of E15; (2) Growth Energy failed to meet the required evidentiary burden under that same section; (3) the EPA did not provide enough opportunity for comment on "certain aspects of its waiver decision;" and (4) the record did not support the EPA's waiver decision.[77] The court consolidated the petitions, and Growth Energy intervened in support of the EPA.[78]

The EPA did not contest standing on any level, although Growth Energy raised the issue of Article III standing.[79] Objection notwithstanding, the court stated it had an obligation to review standing before it considered a review of the merits.[80] As a result of the court's

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70. *Id.* at 172.
71. *Id.*
72. *Id.* (citing 42 U.S.C. § 7545(o)(2)(B)(i)(I) (2012)).
73. *Id.* at 172.
74. *Id.*
75. *Id.* at 173. Growth Energy is a lobbying group that includes Poet LLC of Sioux Falls, South Dakota, the largest U.S. biofuels-maker. Bjerga, *supra* note 68.
76. *Grocery Mfrs.*, 693 F.3d at 173.
77. *Id.* at 173-74.
78. *Id.* at 173.
79. *Id.* at 174.
80. *Id.*

standing review, the petitions were dismissed and the court did not reach the merits of the case.[81]

B. Majority Opinion

To begin the standing analysis, the majority stated, "EPA's waiver decisions do not on their face directly impose regulatory restrictions, costs, or other burdens on any of these [Petitioners]," and, therefore, the "Petitioners have to demonstrate that EPA's actions—in particular, approving E15 via partial waivers—have caused any one of their members an injury in fact for which we can provide redress . . . ."[82] The majority then analyzed each petitioner group separately.[83]

1. The Engine Group's Standing Analysis

The Engine Group asserted a two-pronged argument, one based on its members manufacturing equipment not certified for E15 and another based on a risk consumers may "misfuel" E15 in unapproved vehicles.[84] Both prongs of the argument contended use of E15 "may" damage engine emission controls and that damage of this type may result in warranty and safety claims or result in the government imposing recalls of some engines.[85]

The majority held that the alleged potential injury failed to meet the burden to show Article III causation.[86] First, the Engine Group's only support for its assertion was a single reference to a Mercedes-Benz study that indicated a two percent reduction in fuel consumption and "potential vehicle damage" from E15 in Mercedes vehicles.[87] The court found this evidence did not amount to a "substantial probability" of injury.[88] Second, the possibility consumers would misfuel E15 in unapproved engines or equipment was not a cause that was traceable to the EPA waivers.[89] The court found the second argument too attenuated and the argument failed because "it [would] require that consumers use the fuel in engines for which

81. *Id.* at 180.
82. *Id.* at 175.
83. An organization or trade association has standing if it can show "that . . . a member 'would have standing to sue in [its] own right,' . . . 'the interests the association seeks to protect are germane to its purpose,' and . . . 'neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit.'" *Id.* at 174-75 (quoting Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002)).
84. *Id.* at 175-76.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 176.
89. *Id.*

it [was] neither designed nor approved, suffer damages . . . as a result, and bring successful warranty or other liability lawsuits."[90] Article III requires an injury that "fairly can be traced to the . . . [d]efendant, and not . . . from the independent action of some third party," a requirement the court found was not present.[91]

2. The Petroleum Group's Standing Analysis

The Petroleum Group's argument also had two prongs: (1) if the waivers were upheld, producers and refiners would be forced to produce the new fuel to meet the renewable fuel volumes required by the RFS, and (2) if producers and refiners were ultimately forced to produce E15, downstream entities would be forced to invest in handling and transportation infrastructure and processes, resulting in substantial costs.[92]

The majority held that neither of the prongs met the causation element of Article III because any such increased costs would be incurred voluntarily.[93] First, the court found that any pressure to produce E15 was found in the RFS requirements themselves, rather than in the EPA's waivers, which only relieve the impediment of introducing the new fuel into commerce and thereby provide producers the "option" to produce.[94] Second, the court also found that the Petroleum Group offered no reasoning why the group could not introduce some other type of renewable fuel instead of E15.[95] Third, the court stated that if producers and refiners ultimately manufactured E15, any downstream entities involved in transferring, handling, or blending of the fuel that incur increased costs in infrastructure and processing would do so in their own economic interests.[96] Finding nothing in the RFS or EPA partial waivers required these entities to incur such costs, the majority reasoned that the decision to do so would be grounded in "self-interest" as a choice to capture market benefits and not take the risk of losing business.[97] In other words, if members of the Petroleum Group were injured with increased costs "traceable to anything other than their own choice to incur them," those costs were "self-inflicted" because they would be incurred as a result of the RFS and not as a result of the EPA acts challenged in this action.[98]

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90. *Id.*
91. *Id.*
92. *Id.* at 176-78.
93. *Id.*
94. *Id.* at 177.
95. *Id.*
96. *Id.* at 178.
97. *Id.*
98. *Id.* at 177.

3. The Food Group's Standing Analysis

The Food Group argued that, because their products and ethanol fuels each use corn as a primary ingredient, the group would incur increased costs as it competed for corn supply with ethanol manufacturers.[99] The court found, however, that the Food Group failed to meet the prudential requirement that a petitioner must be within the zone of interests regulated by a challenged statute or within any provision that is "integrally related" to it.[100] Even though the EISA does in fact require the EPA to review any renewable fuel's impact on agricultural commodity and food prices, the challenge brought was against the CAA's section 211(f)(4).[101] Both the EISA and CAA "have fuel as their subject matter, and the RFS may have even incentivized Growth Energy to apply for a waiver," but more would be required to establish an integral relationship between the two.[102] The majority reasoned that allowing prudential standing under EISA, when the challenge was brought against the CAA, would deprive the "'zone-of-interests test . . . of virtually all meaning.'"[103]

C. Judge Kavanaugh's Dissent

Judge Brett Kavanaugh disagreed with the majority holdings that the Petroleum Group did not have Article III standing and the Food Group did not have prudential standing.[104] Judge Kavanaugh also formed part of a majority, with Judge Tatel, which found the Food Group did have Article III standing.[105]

Judge Kavanaugh's argument that the Petroleum Group had Article III standing was based on the determination that E15 was a necessary and unavoidable consequence of the RFS requirements combined with current progress toward other renewable fuel options.[106] Conceding the waivers alone did not require the Petroleum Group to produce E15, Judge Kavanaugh argued that, but for the waivers, the producers could not meet the RFS requirements.[107] Now with the impediment removed, the producers could likely meet the RFS, but required E15 to do so.[108] The dissent reasoned that the RFS directly regulated gasoline producers and

99. *Id.* at 179.
100. *Id.*
101. *Id.* (citing 42 U.S.C. § 7545(o)(2)(B)(ii)(VI) (2012)).
102. *Id.*
103. *Id.* (quoting Fed'n for Am. Immigration Reform, Inc. v. Reno, 93 F.3d 897, 903 (D.C. Cir. 1996)).
104. *Id.* at 181 (Kavanaugh, J., dissenting).
105. *Id.*
106. *Id.* at 188-90.
107. *Id.* at 189.
108. *Id.*

required them to introduce an increasing amount of renewable fuels.[109] With the impediment to producing more ethanol-based fuel removed by the E15 waivers, the Petroleum Group would be required to produce E15 to meet the RFS.[110] Based on this reasoning, Judge Kavanaugh found there was a substantial probability that the E15 waivers would result in the Petroleum Group incurring costs that were not "self-imposed."[111] "In the real world," Judge Kavanaugh asked, "does the petroleum industry have a realistic choice not to use E15 and still meet the statutory renewable fuel mandate?"[112] Judge Kavanaugh found the answer to be "no,"[113] and, therefore, causation was not defeated because the alleged injuries were not self-inflicted.

Judge Kavanaugh's dissent regarding the Food Group was based on three arguments. First, because the EPA failed to raise prudential standing, it was waived and the court should not have considered it.[114] That notwithstanding, the Food Group satisfied prudential standing under two chains of reasoning. First, the RFS and the CAA's section 211(f)(4) waiver procedures were integrally related because the RFS takes into account the impact on food prices, so it "is reasonable and predictable to think of . . . the [F]ood [G]roup as proper plaintiffs."[115] The dissent argued that section 211(f)(4) was promulgated "with 'at least one eye' toward the [RFS requirements]," similar to *Match-E-Be-Nash-She-Wish*.[116] In addition, the dissent found that the EPA waivers loosened restrictions on competitors in the corn market, namely the Petroleum Group, which gave the Food Group prudential standing because standing allows for complaints related to regulation of competitors, consistent with *Clarke* and *Data Processing*.[117]

D. Judge Tatel's Concurrence

Judge David Tatel's concurrence agreed with the dissent that the Food Group had Article III standing, yet sided with the majority that the group failed on prudential grounds.[118] Judge Tatel also noted that, in contrast with the dissent, stare decisis, based on prior circuit cases, required the panel to

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 190.
113. *Id.*
114. *Id.* at 183-84.
115. *Id.* at 186-87.
116. *Id.* at 187 (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2211 (2012)).
117. *Id.* at 188.
118. *Id.* at 180 (Tatel, J., concurring).

hold that prudential standing was jurisdictional and hence non-waivable by the EPA.[119]

IV. ANALYSIS

The majority's decision to deny standing to the Petroleum Group and the Food Group was inappropriate. Part A of this Section discusses why the court's denial to the Petroleum Group was a restrictive application of the causation requirement of Article III by finding this group's participation in E15 would be a self-inflicted injury. Part B reviews why the Food Group should have been considered within the zone of interest of the CAA section 211(f)(4) provision based on an appropriate application of the zone of interest analysis and in light of the recent *Match-E-Be-Nash-She-Wish* decision by the Supreme Court. An extension of this analysis will address the dissent's view on the prudential competitor standing doctrine.

A. The Petroleum Group Meets the Article III Causation Requirement

The majority took an incorrect position in denying the Petroleum Group Article III standing. It is hardly conceivable that standing can be denied, on the basis of self-inflicted injury, to a petitioner where a scheme of regulations requires the party to affirmatively act or be in violation. This result is essentially the position taken by Judge Kavanaugh in his dissenting opinion.[120] The point made by the majority in its "grounded in economics" view is that, even though the Petroleum Group was in fact mandated to introduce increasing amounts of renewable fuels, the group had choices other than E15.[121]

While it may be true that producing E15 could be a present choice in economics because research and development of alternatives, or introduction of any such alternative, is cost prohibitive,[122] it is equally true that holistically the group does not have an economic choice. There is an absence of choice because, at some point, the group will be required to introduce new fuels to meet the RFS requirements.[123] The court's reasoning, therefore, creates a practical prohibition to any attempt to challenge a new fuel because there will always be another, less economical alternative. While the court stated that there is not a "Hobson's choice"

119. *Id.*
120. *Id.* at 188-91 (Kavanaugh, J., dissenting).
121. This is true even if the "choice" is to research, develop, and introduce some alternative fuel, or implicitly avoid the market altogether. *See id.* at 177 (majority opinion).
122. *Id.*
123. *See* 42 U.S.C. § 7545(o)(2)(A)(i) (2012) (mandating the EPA Administrator to "ensure that transportation fuel sold or introduced into commerce in the United States . . . contains at least the applicable volume of renewable fuel").

between introducing E15 or violating the RFS,[124] in effect that is exactly the case if considered in the aggregate—at some point the members will have to introduce a new fuel.

The dissent argued that, in the present, the Petroleum Group does not have a "realistic choice not to use E15."[125] While that argument is based on the present, it is worth asking: Does the Petroleum Group have a realistic choice not to implement some alternative fuel in the future? The answer is no, but the majority's reasoning will always deny standing because there are, or could be, alternatives. It is not difficult to imagine a future challenge to an E20 waiver being denied on grounds that the Petroleum Group now has the option to produce E15—an option that also could not be challenged.

Finally, the majority's reasoning used to deny standing based on self-inflicted injury is a liberalization of the cases relied upon. In formulating its opinion, the majority relied upon *Public Citizen* and *Petro-Chem Processing*,[126] which were decided in light of their predecessors, *Diamond* and *Pennsylvania*. The latter two Supreme Court precedents are distinguishable from *Grocery Manufacturers* because in those cases the petitioners voluntarily participated in an activity not mandated by the statute being challenged or any statute integrally related. One petitioner in *Diamond* merely decided to intervene in a lawsuit, and the injury was the resulting legal costs,[127] and the petitioner in *Pennsylvania* made a voluntary decision to offer tax credits for taxes paid in another state.[128] Similarly, the D.C. Circuit's decision in *Petro-Chem Processing* was based on the fact that the petitioners were not required to dispose of hazardous waste in salt domes.[129] In *Public Citizen*, the alleged injury was potential lawsuits, and the denial of standing was predicated on the petitioner having options to prevent the lawsuits in the first place,[130] but the petitioners were also not required to do so.

In all of these cases, the petitioners had a practical and real choice: not participate in the lawsuit; not offer tax credits; not use salt domes; and not manufacture tires that fail at low pressure. Significantly, none of the petitioners would have violated a statute if they chose one option over another. In *Grocery Manufacturers*, however, the choices were: (1) produce E15; (2) research, develop, and produce an alternative to E15; or (3) violate the increasing requirements of the RFS. To consider this case

124. *Grocery Mfrs.*, 693 F.3d at 178.
125. *Id.* at 190 (Kavanaugh, J., dissenting).
126. *Id.* at 177 (majority opinion).
127. Diamond v. Charles, 476 U.S. 54, 69-71 (1986).
128. Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976).
129. Petro-Chem Processing, Inc. v. EPA, 866 F.2d 433, 438 (D.C. Cir. 1989).
130. Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1290 (D.C. Cir. 2007).

analogous, the majority had to stretch the causation requirement to say that if there is any possibility of an alternative course of action, then by not taking that alternative, petitioners have a self-inflicted injury regardless of how practical or real the alternative is. When the Supreme Court declared a cause of injury must be fairly traceable to, and not too attenuated from, the defendant's conduct,[131] it seems unlikely the Court meant to require a stronger relationship than what existed between the EPA and the Petroleum Group in *Grocery Manufacturers*. The Court's cases have generally demonstrated, as have many cases in the circuit courts, a tolerance to not defeat standing due to the plaintiff contributing to his own injury.[132] A "failure to exhaust alternative means" need not be preclusive, and "[s]tanding is defeated only if . . . the injury is so completely due to the plaintiff's own conduct as to break the causal chain."[133]

In *Grocery Manufacturers*, an agency action eliminated an impediment that was the primary protection for the plaintiffs from—in all practical respects—being forced to do something. To hold this scenario as a self-inflicted injury constricts precedential tolerance, and the self-inflicted injury doctrine was therefore liberalized to an impractical extent.

B. The Food Group Meets the Prudential Zone of Interest Test

The majority determined, without much detailed analysis, that the Food Group's interests were not integrally related to the EPA waivers issued pursuant to CAA section 211(f)(4). The majority reasoned that the EISA required the EPA to consider the impact on food prices when setting *future* fuel volume requirements, and thus implicitly did not require the EPA to consider the impact on food prices when issuing *present* fuel waivers.[134] This reasoning left some considerations of the zone of interest test untouched, and when those aspects are considered, the analysis shows the Food Group would satisfy zone of interest standing.

The Supreme Court has conceded that prior cases before the Court have "not stated a clear rule" for the zone of interest test.[135] Nonetheless, the Court has provided analytical guideposts. Recently, the Court reiterated that the test was not intended to be "especially demanding" and should be

131. Allen v. Wright, 468 U.S. 737, 751-52 (1984).

132. WRIGHT ET AL., *supra* note 61, § 3531.5. Of particular interest, *see id.* at n.63 (showing how the D.C. Circuit allowed standing to plaintiffs in *Public Citizen v. Foreman*, 631 F.2d 969 (D.C. Cir. 1980), where plaintiffs alleged that nitrite free bacon was "not readily available at a reasonable price"). The choice whether to purchase nitrite-free bacon was not a preclusion to standing. *See id.*

133. *Id.*; *see also id.* at nn.72-73 (where the authors provide a review of cases supporting this proposition).

134. Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 179 (D.C. Cir. 2012) (emphasis added).

135. Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998).

applied with the focus of making "agency action presumptively reviewable."[136] Additionally, the term "arguably" within the test is intended to give the "benefit of any doubt . . . to the plaintiff."[137] Importantly, the Court does not require "any indication of congressional purpose to benefit . . . the plaintiff."[138] These considerations are given significant weight and permit a court to consider the statutory scheme in which the challenged provision lies. A statutory scheme, however, is not the contextual limit where these measures are invoked. In *Match-E-Be-Nash-She-Wish*, for example, the Court extended the zone of interest to a plaintiff not protected by a statute or any related provision, but rather because an action was taken with "at least one eye" toward the impact the action has on another's interest.[139] This recent application suggests a continued acknowledgment that the Court intends the zone of interest standing test to not be too demanding or restrictive.

When sufficient weight is given to these qualitative measures, the Food Group's prudential standing becomes easily "arguable." The statutory scheme in which the EPA waiver provision lies is integrally related to another provision of the CAA that has an explicit intent to consider the impact of renewable fuel levels on food prices, which is within the interests of the Food Group. Section 211(o)(2) of the CAA requires the EPA to introduce regulations that will ensure compliance with present renewable fuel requirements established out to 2022.[140] Section 211(o)(2)(B)(ii) further requires that, before the EPA can establish increases in renewable fuel levels after 2022, the EPA must consider the impact on *food prices* and other factors.[141] And in the event a new fuel is required to meet either pre- or post-2022 levels, the EPA will have to grant a waiver for its introduction pursuant to CAA section 211(f)(4).[142] Therefore, after 2022, an EPA waiver to grant a new fuel introduction will be merely one degree of separation from the provision requiring the EPA to consider interests in food prices. Undoubtedly, post-2022 waivers would be considered integrally related and not too attenuated with the protected food price interest, and, therefore, the Food Group would be within the zone of interest in that era.

It is illogical that a party with interests in food pricing could be within a zone of interest in 2023, yet not be in the present. A plaintiff's interest fails only if it is so "marginally related to or inconsistent with the purposes

136. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012) (citations omitted).
137. *Id.*
138. *Id.*
139. *Id.* at 2211.
140. 42 U.S.C. § 7545(o)(2) (2012).
141. *Id.* § 7545(o)(2)(B)(ii) (emphasis added).
142. *Id.* § 7545(f)(4).

implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[143] The integral relationship between the waiver provision and the provision protecting the Food Group's interest must exist in the present as it would in 2023, or the zone of interest test truly is "deprive[d] . . . of virtually all meaning."[144]

Judge Kavanaugh's dissent rightly recognized that the provision requiring consideration of food prices and other interests is part of a "balance" that Congress intended within the RFS.[145] This argument adds additional logical support to the argument made above. Renewable fuels that ultimately get introduced into the marketplace, or at least are permitted to be introduced by EPA waivers, are all part of an act of Congress directed at reducing energy dependence and enhancing air quality, but not without consideration of many other interests, including food prices.

The dissent also offered a similar line of reasoning based on the Supreme Court's recent decision in *Match-E-Be-Nash-She-Wish*. The Court reasoned that a statute allowing land acquisition was positioned in an overall scheme designed to promote Native American economic development, and because land acquisition was the primary mechanism to promote the economic development through "tourism, manufacturing, mining, logging, . . . and gaming,"[146] when the Secretary of the Interior acquired land under the acquisition statute, "she [did so] with at least one eye directed toward how [the Indian tribes would] use those lands."[147] Analogous to this reasoning, the renewable fuel provisions of the CAA are designed to enforce the increased use of renewable fuels. Because the introduction of new fuels is the primary mechanism to accomplish this increased use, especially in a situation where existing supplies of renewable fuels have reached a saturation point, when the EPA waives the introduction of new fuels it does so with "at least one eye directed" at satisfying the renewable fuel mandates in the CAA. Therefore, allowing the Food Group to challenge the waiver based on alleged economic injury from an activity permitted by the waiver is a consistent application of *Match-E-Be-Nash-She-Wish*. If it is arguable that an adjacent landowner has zone of interest standing to challenge a land acquisition statute based on how the land will be used, it is at least as arguable that an industry with interests in raw material costs is within the zone of interest of a statute that permits an activity that will cause the material price to increase.

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143. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2210 (citations omitted).

144. Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169, 179 (D.C. Cir. 2012) (citations omitted). The majority used this argument to support its position that the provisions were not integrally related. *Id*.

145. *Id*. at 186-87 (Kavanaugh, J., dissenting).

146. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2211 (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 15.01, at 965 (2005 ed.)).

147. *Id*.

Finally, "competitor" standing may also help demonstrate the Food Group's standing here, but is a more difficult argument to make. The dissent takes the view that the Food Group satisfies prudential standing because the waiver loosens restrictions on a competitor, a view that seems to hold as a general proposition that regulation of a competitor automatically satisfies prudential standing tests.[148] While this argument has appeal, it is generally unsupported by prior competitor standing decisions.

The Food Group's members require corn as an ingredient for some of their products,[149] and members of the Petroleum Group use corn in the manufacture of ethanol.[150] Because E10 concededly has reached its practical capacity limitation in the biofuel blending and distribution network,[151] the waiver to allow the Petroleum Group to produce E15 will invariably increase competition for domestic production of corn. In this respect, the Food Group is similarly positioned to the data processors in *Data Processing* and the securities dealers in *Clarke*. In both of those cases, neither plaintiff was a directly regulated party, yet both were considered within the zone of interest because the statutes directly regulated their competitors. Judge Kavanaugh also relied on *Sherley v. Sebelius* in holding that prudential standing is found if competition existed in upstream markets.[152] *Sherley* also revealed that the plaintiff's interests were consistent with the purpose of the statute to regulate a form of competition.[153] This finding was consistent with *Clarke* and *Data Processing*. The similarities with the Food Group, however, end at this point.

The statutes considered in *Data Processing*, *Clarke*, and *Sherley* were intended to restrict competitive behavior, and, therefore, the statutes protected interests within those same activities.

Competitor standing does not fit as strongly with the Food Group because the CAA waiver provision is part of an act that has the purpose of introducing increasing amounts of renewable fuels, not limiting competition. An argument that the provision, or any integrally related to it, is intended to restrict the Petroleum Group from certain competitive activities is tenuous. While *Data Processing* noted the increasing trend to expand the list of potential plaintiffs that can challenge agency action,[154] expansion has yet to reach the point where generally any competitor of a

148. *Grocery Mfrs.*, 693 F.3d at 186-87 (Kavanaugh, J., dissenting).
149. *Id.* at 179 (majority opinion).
150. Bell, *supra* note 4.
151. *Grocery Mfrs.*, 693 F.3d at 172.
152. *Id*. at 183 (Kavanaugh, J., dissenting).
153. Sherley v. Sebelius, 610 F.3d 69, 75 (D.C. Cir. 2010).
154. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970).

party regulated by a statute will have prudential standing.[155] The requirement for the regulation to have a "purpose" to regulate competitive acts is the underpinning of the competitor standing zone of interest doctrine.

Judge Kavanaugh's competitor standing argument aside, the Food Group should have been granted standing because the CAA waiver provisions and the RFS standards set forth by the EISA are integrally related, and, therefore, the Food Group was within the zone of interests of the CAA waiver provision. One must keep in mind the guideposts of the zone of interest test analysis. If the test was not intended to be especially demanding, should be applied with a focus on making agency action presumptively reviewable, and any benefit of doubt should go the petitioner,[156] the D.C. Circuit's application in *Grocery Manufacturers* fails.

V. CONCLUSION

The U.S. Court of Appeals for the District of Columbia Circuit incorrectly decided that none of the *Grocery Manufacturers* petitioners met both Article III and prudential standing. Although what constitutes a sufficient showing to overcome either standing doctrine is not perfectly clear, there exists enough guidance and precedent to support a finding that at least two of the three Petitioners met both doctrines. The Petroleum Group's dismissal based on self-inflicted injury was an inappropriate extension of a bar generally applied where a plaintiff has a real and practical choice. To liberalize the self-inflicted rule to the extent promoted in this case would prevent almost any plaintiff from having standing if a court can conceive of a hypothetical alternative. The Food Group's failure to meet the zone of interest test was a restriction of a doctrine intended to be a low bar, and one that cannot be logically supported. If the Food Group would arguably be within the zone of interest in the future when the EPA is required to consider the impact of increasing renewable fuels on food prices, an argument that the same series of provisions do not find the Food Group within the zone of interest in the present cannot hold. The majority

155. However, competitor standing, as it relates to the Article III elements of injury and causation, is well established. The D.C. Circuit stated in *Sherley*, "Regardless how we have phrased the standard [for competitor standing] in any particular case . . . the basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact." 610 F.3d at 73. *See also* Tel. & Data Sys., Inc. v. FCC, 19 F.3d 42, 47 (D.C. Cir. 1994) ("In this case we need not attempt any broad explication of the justiciability of indirect injury, for one narrow proposition at least is clear: injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality."); *cf.* Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 358 (2004) (discussing historical background and current complexities in competitor standing rulings).

156. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012) (citations omitted).

dismissing these two petitioners for lack of standing goes beyond what precedent and logic would permit.